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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

PRECISION CONTRACTORS, INC.,

Plaintiff and Appellant,

v.

ANDERSON WHITE, A CORPORATION,
et al.,

Defendants and Respondents.

B160317

(Los Angeles County
Super. Ct. No. BC251097)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Barbara A. Meiers, Judge. Affirmed.

Kulik, Gottesman & Mouton, Glen L. Kulik and Amy Creager for Plaintiff
and Appellant.

Robins, Kaplan, Miller & Ciresi and Stanley Haren for Defendant and
Respondent Developers Insurance Company.

INTRODUCTION

Appellant/plaintiff, Precision Contractors Inc. (“Precision”), appeals from a judgment entered in favor of the respondents/defendants, hereafter delineated, at a hearing on cross-motions for summary judgment. The respondents/defendants are: Anderson White, a corporation (“A/W”); Developers Insurance Company, a corporation (“Developers”); and Whittier Union High School District, a California Public Entity (“District”).

The procedural aspect of the case is complicated and involves the interplay of rulings by four Los Angeles County Superior Court judges. The proceedings in the trial court are set forth with a great deal of particularity so that the analysis and disposition by this court are made manifest.

By way of preview, the substance of the appeal involves the right of an unlicensed corporate contractor (sub-contractor) to recover compensation for work performed in view of prophylactic statutes denying the right to recover for failure to comply with California licensure requirements. The appeal further involves the issue of whether the unlicensed corporate contractor, Precision, has *substantially complied* with licensure requirements thereby entitling it to recover, and if not, is the unlicensed contractor entitled to recover under the doctrine of quantum meruit or some other equitable doctrine.

FACTUAL AND PROCEDURAL SYNOPSIS

Factual History.

In July of 2000, general contractor, A/W, entered into a contract with the District to perform construction work at Santa Fe High School. Developers issued a California public work’s payment bond on behalf of A/W which provided for a guaranteed payment to all subcontractors and material suppliers of A/W in connection with the project.

In August of 2000, Precision submitted a subcontract proposal to A/W containing a contractor's license number, which was later discovered not to be Precision's license number. A/W accepted the proposal of Precision and entered into an oral subcontract for work on the District's project, which was to be followed by a written standard contract.

From August 2000 through October 2000, Precision performed the work called for under the agreement, but disputes soon arose between A/W and Precision which prompted Precision to file suit against A/W, Developers and the District to recover compensation for work allegedly performed by Precision. As part of its allegations, Precision states that it is a California corporation, licensed as a contractor in California and in its capacity as a contractor entered into the subcontract with A/W.

The record reveals that in 1998 Precision was incorporated in California, but at the time the proposal was submitted to A/W and at the time it entered into the subcontract with A/W and performed the work called for under the subcontract it was not licensed as a contractor in California. It was not until several months had expired following the completion of work on the project that Precision applied for its own contractor's license. Precision applied for its own contractor's license in February of 2001 and it was not until July of 2001 that the license was obtained.

Historically, one Robert West ("West") has been a licensed contractor in California since 1989 and has been doing business as "Precision Contractors" since 1994. Prior to the incorporation of Precision in 1998, Precision was a sole proprietorship owned and operated by West. Since incorporation West has been the sole owner of Precision and maintains that he has been the only responsible managing officer ("RMO") of Precision and further maintains Precision's mode of operation was the same before and after incorporation; after 1998 West believed that in his capacity as the sole owner/RMO/work supervisor/sole decision maker of Precision no separate license was required of the corporation; West's personal license was in effect qualifying him to do the work on the project and remained in effect throughout the project.

After performance of the work called for in the subcontract, West learned that it was better practice for Precision to have its own license and promptly applied to the licensing board to have his license transferred to Precision whereupon the board reissued West's same license in the name of Precision with West being designated as RMO of Precision.

Upon completion of work by Precision, A/W notified Developers that Precision would be paid upon submission of an invoice and upon signing of the standard form contract.

Precision contends that the only reason given by A/W for non-payment was Precision's refusal to sign what it perceived as a one sided contract after work on the project had been completed.

Procedural History.

On May 24, 2001, Precision filed its complaint for damages pleading four causes of action: "1. Breach of Contract; 2. Quantum Meruit; 3. Action on Contractor's License Bond; [and] 4. Action On Stop Notice."

On June 29, 2001, the defendants previously delineated in this opinion filed their answer to the complaint pleading general and specific denials and forty two affirmative defenses. The thirty-ninth affirmative defense provides the focal point for the disputes involved in the action and on this appeal. It states: "Plaintiff entered into the contract with the defendant Anderson/White and acted as a contractor within the meaning of Business and Professional [sic] Code Section 7026 at all time relevant to this action, but without holding a valid contractors license as required by Business and Professions Code Section 7028. Therefore, plaintiff is barred by Business and Professions, Code Section 7031 from bringing or maintaining any action for collection of compensation for performance of the contract, any act under the contract, or any agreement for extras to be

furnished in connection with the contract. This bar extends to any action against Defendant, Anderson/White.”

Proceedings before Judge Aurelio Muñoz.

On October 5, 2001, defendants filed a motion for summary judgment, with the required documentation, in which it was maintained that summary judgment should be entered in their favor because of the bar against Precision maintaining its action for failure to adhere to the licensure requirements for contractors doing business in California. The matter was set for hearing before Judge Muñoz in Dept. 47 on November 5, 2001. By minute order dated 11/05/01, the court denied the motion which is reflected in the minutes as follows: “The motion is denied. There is a factual issue as to whether the substantial compliance doctrine of SECTION 7031(D), BUSINESS AND PROFESSIONS CODE applies. See G E HETRICK & ASSOCIATES V SUMMIT CONSTRUCTION & MAINTENANCE CO (1992) 11 CA4 TH 318; ASDOURIAN V ARAJ (1985) 38 CAL3D 276.”

On November 29, 2001, defendants filed a petition for writ of mandate and/or prohibition in the appellate court seeking an order to compel the trial court to enter summary judgment for petitioners. The writ was denied on December 6, 2001.

Proceedings before Judge Kenneth Gale.

On January 11, 2002, Precision filed a motion for summary adjudication of the causes of action for breach of contract and quantum meruit, supported by required documentation, and the matter was eventually heard before Superior Court Judge Kenneth Gale in view of the unavailability of Judge Munoz. The ruling of Judge Gale, expressed in a minute order dated 03/22/02 was as follows: “. . . Plaintiff’s motion for summary adjudication is denied as the court previously found that there was a triable

issue as to substantial compliance. In addition, there is factual issue concerning the extent of money owed. Defendants motion to bifurcate the issue of compliance with licensure is granted. COURT TRIAL as to the issue of licensure is set 05/14/02 at 9:00 a.m. in this department.”

Proceedings before Judge Barbara A. Meiers.

On April 2, 2002, Precision filed a motion for reconsideration of the denial of its motion for summary adjudication of issues pursuant to Code of Civil Procedure section 1008. The matter was set for hearing in Dept. 12 before Judge Meiers because neither Judge Muñoz nor Judge Gale were available to hear the matter. After additional briefing was filed pursuant to court order the matter was heard on 5/14/02. Prior orders of the court were vacated (orally as reflected in the reporter’s transcript but not in the minute order) and the matter was heard in the posture of cross-motions for summary judgment after counsel were permitted supplemental briefing.¹ The matter was taken under

¹ At the hearing on May 14, 2002, the quandary of Judge Meiers is revealed in the following excerpts from the reporter’s transcript which ultimately led to the vacation of the orders of Judge Muñoz and Judge Gale by invoking the court’s inherent powers when the court believes a mistake has been made. Judge Meiers believed a mistake had been made at the initial hearing before Judge Muñoz in that the clerk of the court had not transmitted to Judge Muñoz in Department 47 all of the documents applicable to the hearing before Judge Muñoz, i.e. reply documentation which may or may not have influenced Judge Muñoz’s ruling.

“THE COURT: All right. This matter was originally set today for a trial or mini trial of bifurcated issue on substantial compliance questions.

“The court yesterday considered a motion by the plaintiff to reconsider plaintiff’s summary judgment, slash, adjudication motion, which Judge Gale had denied sitting for Judge Munoz.

“The court then articulated that it believes this reconsideration was appropriate and would do so.

“One of the difficulties, though, that I sensed and I think you sensed from me even when I talked to you about it yesterday was my feeling that the law might point in a totally opposite direction than the way that Judge Munoz had apparently gone.

“And the more I looked at the file and the case law and the pleadings and – I mean, the points and authorities that had come in, both of which were originally before Judge Munoz and now, the more I felt that there is something awfully strange going on because his initial ruling on the defendant’s motion indicated no awareness whatsoever of the changes in the statute or the new cases that had been decided, which seems to me unlikely in how it was done.

“So I pursued the matter. I sought out the law clerk, sought out the memo that the law clerk had done at the time because I suspected from Judge Munoz’ ruling and his failure to discuss any of the things you would normally expect in a summary adjudication ruling like that, i.e., the balancing of different case law, just what material facts still needed to be established, so on, that he might not have ever seen the reply papers that raised all of that.

“I checked the date on the reply papers. I checked where they had been filed. They had been filed downstairs. They had not been filed in Department 47.

“When I looked at the law clerk’s memo, which I have here and I don’t think that Judge Munoz would want me to share with you all the private thinking of the law clerk as it was submitted to him, but I will show you down here you see there is an entry for the argument of the moving party, opposition argument. Moving party reply, blank. They never got it. They never saw it. It was never included by the law clerk or considered by him. It was never submitted to Judge Munoz.

“My feeling, therefore, is that the only proper thing to do in this action again, apropos of what part of what I said yesterday is that, if these are dispositive issues, they ought to be looked at. And they ought to be looked at for their virtues from either perspective.

“Well, now we’re in a posture to do that. We have a motion by the defense for summary judgment adjudication. We have a motion from the plaintiff, a cross-motion for summary judgment or adjudication.

“I gave you a case that came down just Friday in the advance sheets called Kollander – that’s spelled K-o-l-l-a-n-d-e-r – Construction Inc. v. Superior Court of L.A. County.

“This is a decision out of our second appellate district. And you must have wondered why in the world is the judge having us look at this.

submission and the ruling of the court was issued on 5/28/02 by minute order which stated:

“Court’s written orders as follows: The defendant’s cross-motion for summary judgment is granted, the court finding that on the undisputed facts that plaintiff corporation was never licensed before or during the job in issue, even taking all facts most favorably to plaintiff (and assuming them to be true for the purposes of this motion), defendants are entitled to a judgment as a matter of law in this case. Plaintiff’s cross-motion for summary judgment is denied. In keeping with this summary judgment ruling, it is the final judgment of the court that plaintiff is to recover nothing from any defendant

“Well, I had to sit in the back reading it and it’s because I think it’s a very important and very new decision.

“It says that these statutory – I don’t want to use the word requirements – but the statutory standards of motions for reconsideration being made within ten days after a ruling on a motion has been made are not binding on the courts. That if the court is of the view that a mistake has been made –

“MR. ALLARD: Court has inherent power.

“THE COURT: The court even on its own motion to set aside and vacate its earlier rulings.

“That is something that I am about to do. I’m about to vacate these rulings so that we are sitting now in the posture of having summary judgment rulings to be made on both sides’ motions.

“ . . .

“So I will hear from you both on this Kollander issue. I realize this is all a surprise to you. I’m sure it’s also a surprise to you that Judge Munoz had never seen these important arguments. Certainly it’s a hard argument to make, I think, for anybody that the court should be held or the other side should be held to a ruling that was made without any opportunity to really hear the other side’s arguments, and even in oral argument, you know, I think attorneys kind of assume that court has read and seen all the papers.”

with costs awarded to the defendants according to law. Defendants are to prepare a written judgment for the court's signature and submit it by 06/04/02."

On June 4, 2002, Judge Meiers signed a judgment in favor of defendants and against plaintiff and awarded costs of suit for defendants.

Proceedings before Judge Robert H. O'Brien.

On July 22, 2002, the motion of the defendants, A/W and Developers, was heard before Judge O'Brien to determine the prevailing party in the action and to fix the amount of attorneys' fees and costs, presumably by reason of the unavailability of judges Muñoz, Gale and Meiers. Following argument of counsel defining for Judge O'Brien the procedural posture of the case, the court took the matter under submission. Later the same day the court made its ruling on the submitted matter as follows: "LATER: Court orders as follows: The judgment from which the present motion arises is a summary judgment order issued on 05/28/02 followed by the formal judgment of 06/04/02. The Court is concerned that that judgment may be vulnerable because the judgment did not emanate [sic] from a pending motion for summary judgment by moving party. Accordingly, the Court denies, without prejudice, the motion pending determination of the procedural issue noted above on appeal, if there is an appeal. The Court has not reached the merits of the motion.

On July 22, 2002, Precision filed a timely appeal from the judgment.

DISCUSSION

Preliminary Considerations On The Standard Of Review.

Initially, we address the concerns of Judge O'Brien pertaining to the judgment being vulnerable because the judgment did not emanate from a pending motion for summary judgment by the moving party. Judge O'Brien is correct in his observation, but

in error in ruling that the judgment is vulnerable. We need look only to the California decision in *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130 for a resolution of the stated concern of Judge O'Brien. This court is aware that *Arceneaux* involved factual distinctions, but the basic principles set forth by the high court are applicable to a resolution of the procedural posture of this appeal. In *Arceneaux* our high court went to considerable lengths to elaborate on the doctrine of *invited error*. In essence our California Supreme Court taught us that invited error occurs when counsel in the trial court is aware of an error being committed but elects to say or do nothing in hopes that the posture on appeal will be enhanced for some reason. The high court frowned on this procedure and declared it to be wasteful of judicial resources with the consequences that the error is waived for purposes of appeal and the appellate court will not consider the issue.

We have searched this record in vain to discover any meaningful objection by counsel to having the matter resolved in the trial court by Judge Meiers on the basis of cross-motions for summary judgment. The segment of the reporter's transcript referred to in foot note 1, *ante*, is devoid of any objection to the trial court proceeding by way of cross-motions for summary judgment and indeed counsel participated by arguing the cross-motions. We therefore reach the conclusion that any purported error of Judge Meiers in proceeding on cross-motions for summary judgment on 5/14/02 is waived for purposes of this appeal.

Standard of Review.

The standard of review from a judgment emanating from the granting of a motion for summary judgment is well developed in California law, as recently expressed by the California Supreme Court in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826. None of the parties to this appeal contest the standard of review therefore a brief statement of the standard is warranted. An appellate court reviews the judgment *de novo*

to determine whether triable issues of material fact exists. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Appellate courts are bound by the same rules and standards that apply to the trial court pursuant to section 437c of the Code of Civil Procedure. As to the merits of the motion, a view is taken in a light most favorable to the appellant because the law favors the policy of having matters tried fully on the merits as opposed to being summarily determined. (*Stratton v. First National Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.) With this brief standard of review well in mind, we proceed to the merits of the appeal.

Contentions of the Parties.

Precision.

As stated by Precision in its appellant's brief: "Precision will demonstrate . . . that since West was fully and properly licensed at all relevant time, Section 7031(a) is not a bar to Precision's recovery in this case. At a minimum, under the judicial doctrine of substantial compliance as it has existed at all times in California (except for the limited period 1990-91), the license held by the Precision's responsible managing officer ("RMO") is sufficient to allow Precision to recover its fee from A/W. Precision will further demonstrate that the legislative history of Section 7031, the cases cited by Precision, and even the cases cited by A/W in the trial court, stand for this very proposition. There has been 'substantial compliance' with the State licensure law as that term is defined in section 7031(e) of the Business and Professions Code."

Developers (Only Developers filed a Respondent's Brief).

As stated in the respondent's brief: "Respondents contend that because Precision Contractors, Inc. was unlicensed prior to and during performance of the subcontract, Precision Contractors, Inc. is barred from bringing or maintaining any action against

Anderson/White and Developers, further, that the substantial compliance exceptions of §7031(e) do not apply.”

Section 7031, subdivision (a)² on its face bars Precision from recovery.

Section 7031, subdivision (a) provides as follows: “Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of [] this State for the collection of compensation for the performance of any act or contract where a license is required by this Chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under the chapter but failed to comply with Section 7029.”

Respondent’s conclusion on section 7031, subdivision (a), as interpreted by case law, is summarized as follows: California courts have strictly construed section 7031 even if it leads to harsh and inequitable results, preventing unlicensed contractors from recovering compensation reflects a strong public policy of protecting the public from incompetent construction work (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 997); the deterrent purpose of section 7031 outweighs any harsh result in any particular case (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 380; *Hydrotech Systems, Ltd. v. Oasis Waterpark, supra*, 52 Cal.3d at p. 995); and the lack of a contractor’s license precludes the contractor not only from seeking compensation from

² Unless otherwise indicated all statutory references are to the Business and Professions Code.

the contracting party but from the contracting party's surety (*Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141).

This court agrees with respondent's conclusion. It is undisputed that Precision was not licensed either before or during the performance of the subcontract.

Precision invites this court to interpret section 7031, subdivision (a) as not applying to a corporation, and not requiring a corporation to have its own contractor's license as long as one of its officers is in the possession of an individual license. The invitation is extensive as Precision urges that "there is no indication in the statutes that a corporation can act in the capacity of a contractor. We decline to accept Precision's invitation for the following reasons:

Section 7068, subdivision (b)(3) specifically provides for the method by which a *corporation* must apply for a contractor's license.

Section 7025, contained in division 3 of Chapter 9 of the Business and Professions Code also provides as follows:

"Person as used in this chapter includes an individual, a firm, co-partnership, *corporation*, association or other organization or any combination thereof." (Italics added.)

As section 7031 is included in the same chapter as 7025, and remembering a court's duty to read in harmony statutes enacted by the legislature, the only logical conclusion is that under section 7031, subdivision (a) no *corporation* engaged in or acting in the capacity of a contractor may obtain relief if the corporation is not in possession of a contractor's license.

We are mindful of Precision's argument that by the use of the terms "he" or "she," in addition to the use of the term "person" implies that the legislature intended to alter or narrow the definition of "person" so as to exempt corporations from the statute's requirements. We find such a construction to be strained and cryptic. As respondents point out, the term "he" has been used in the statute since its inception in 1939, the same year the legislature enacted section 7025. In 1989, the legislature inserted the term "she"

which is characterized as a nonsubstantive gender-related change. To conclude that the term “person” should be more narrowly defined because of the use of the terms “he” or “she” in section 7031 would contradict consistently established legislative intent and precedent, in which the courts have firmly established that section 7031 applies to corporations, firms, co-partnerships, associations or other person as defined in section 7025. (*Kirman v. Borzage* (1944) 65 Cal.App.2d 156 [co-partnership required to show it was licensed before obtaining recovery for construction work performed]; *Hydrotech Systems, Ltd. v. Oasis Waterpark, supra*, 52 Cal.3d 988 [interpreting § 7031, subd. (a) to apply to foreign corporations]; *Precision Fabricators, Inc. v. Levant* (1960) 182 Cal.App.2d 637 [joint venture must hold license in its own name to obtain relief for construction work performed even though the individual partners to the joint venture were licensed]; *Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170 [corporation held to requirements of § 7031]; *Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254 [corporation must comply with § 7031]; *General Ins. Co. v. Superior Court* (1972) 26 Cal.App.3d 176, 179, fn. 2 [the word “person” as used in §§ 7031 and 7025 includes a corporation], disapproved of by *Asdourian v. Araj, supra*, (1985) 38 Cal.3d 276 on an unrelated issue.)

We find the contractor’s licensing statutes, including section 7031, were intended to require a corporation to be licensed. Precision’s contentions to the contrary have no merit.

Precision fails the substantial compliance provisions of section 7031, subdivision (e).

As always, the north star of our considerations in dealing with statutory construction and compliance as in this case, is an analysis of the legislation as revealed in the language of the statute itself. In section 7031, subdivision (e), the legislature has provided, effective 1994, as follows: “The judicial doctrine of substantial compliance shall not apply under this section where the person who engaged in the business or acted

in the capacity of a contractor has never been a duly licensed contractor in this state. However, the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) did not know or reasonably should not have known that he or she was not duly licensed.”

It is evident that the legislature has devised a test for substantial compliance which is threefold as cited above. Our analysis leads to the conclusion that Precision has failed all three prongs of the test. We cover each prong specifically in our analysis below, keeping in mind that all three requirements must be satisfied. (*Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th at p. 1262.)

1. Precision has not “...been duly licensed as a contractor in the state prior to the performance of the act or contract.” Although incorporated in 1998, Precision never applied for a license, but relied on the personal license of West as the RMO similarly named Precision, a sole proprietorship. We see no necessity to analyze all case citations set forth by the parties in their briefing which predated the enactment of section 7031, subdivision (e) in 1994 when the current version is clear and unambiguous that “The judicial doctrine of substantial compliance shall not apply under this Section where the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in this state.” Precision has simply failed to comply with the first prong of a statute which is clear and free of ambiguity.

2. We now focus on the second prong to determine whether Precision acted reasonably and in good faith. Our analysis does not cause Precision to fare any better. There is no dispute in this record that Precision was incorporated in 1998 and failed to acquire a license until the completion of work in 2001. Precision would have this court interpret the statute as requiring a subjective belief on the part of the non-conforming party as to the reasonableness and good faith intentions of that party. We discern that the

law is otherwise. We adopt an *objective* standard in examining the second prong requirement of the statute. Perhaps a *clerical* error on behalf of the non-conforming party would satisfy the second prong but clearly the failure to apply for a license until after all the work on the project is complete does not work such a satisfaction. As our high court stated in *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 997, an unlicensed contractor is held to the knowledge of the licensing law's requirement. We find nothing that suggests subjectivity by *Hyrotech*. Our high court obviously intended that an objective view of the evidence be taken in determining the good faith and reasonableness of the non-conforming party in failing to acquire a license. We are quick to note that West had an individual license since 1989. As a person possessed of an individual license, he can hardly be heard to state that he was ignorant of the law's requirement that Precision be licensed. We now place the third prong under our appellate microscope to see if Precision fares any better.

3. Precision admits that it knew the corporation was not licensed, but further asserts that it believed mistakenly that a corporate license was not required. But as discussed in our analysis of the second prong, ignorance of the law is no excuse. We fail to discern how an RMO such as West, possessed with an individual license, could be making such an argument unless made with the proverbial "tongue in cheek" stance. Precision's argument that it has complied with the third prong has no merit.

Legislative policy precludes Precision's claim for quantum meruit relief.

We need look no further than the decision in *Pacific Custom Pools, Inc, supra*, to discern the policy behind denying recovery for a non-conforming contractor. The appellate court stated: "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. "Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*,

and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state.””” (79 Cal.App.4th at p. 1261; citations omitted.)

An examination of the record does not reveal the assertion of any other grounds of equitable relief for Precision and none is apparent to this court.

DISPOSITION

The judgment is affirmed, but the cause is remanded to the Superior Court for a determination of the prevailing party in the action and for fixing attorneys’ fees and costs in the action. Respondent to recover costs of appeal.

WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.